

Department of Justice Brings Novel Prosecution for Insider Trading of Digital Assets

Last year, Cahill attorneys co-authored a *New York Law Journal* article predicting heightened criminal and regulatory enforcement against insider trading in digital assets.¹ That prediction has now come true. The United States Department of Justice (“DOJ”), through the United States Attorney’s Office for the Southern District of New York (“SDNY”), has brought the first criminal prosecution for insider trading of digital assets. The indictment charges Nathaniel Chastain, a former employee of a digital asset marketplace, with one count of wire fraud and one count of money laundering for the alleged insider trading of non-fungible tokens (NFTs), a digital asset typically associated with a digital object (such as art) that provides proof of ownership over that object.²

According to the indictment, Chastain was a product manager at OpenSea, the largest online marketplace for NFTs, and his responsibilities included selecting NFTs that would be featured on OpenSea’s homepage. Featured NFTs, as well as other works from the featured creator, would appreciate in value due to increased publicity and demand.

The DOJ alleges that Chastain was privy to confidential information about which NFTs OpenSea planned to feature on its website for customers, and exploited this information to buy dozens of NFTs shortly before they, or others from a soon-to-be featured creator, were listed on OpenSea’s homepage. Chastain then sold the NFTs shortly after their listing for two-to-five times his purchase price. To conceal his purchases, Chastain allegedly used anonymous OpenSea accounts and transferred funds through multiple anonymous digital currency accounts.

Although the case is being handled by DOJ prosecutors in SDNY’s Securities and Commodities Fraud Unit, the DOJ’s indictment relies on the wire fraud statute to prosecute Chastain’s NFT trading and makes no allegation that any of the NFTs traded were “securities” or “commodities” subject to the insider trading prohibitions of the Securities Exchange Act or Commodity Exchange Act. Moreover, neither the Securities and Exchange Commission nor the Commodity Futures Trading Commission has brought a parallel action. As a result, this case is unlikely to clarify whether NFTs or similar digital assets constitute “securities” or “commodities” under federal law.

Nevertheless, the indictment demonstrates a continuing trend by the government to proceed with novel prosecutions in areas where there has been little regulatory clarity. It also serves as a warning not only for those who trade in digital assets but also platforms that host such trading. The DOJ has focused on digital assets recently, including by setting up a National Cryptocurrency Enforcement Team to investigate and prosecute “criminal misuses of cryptocurrency, particularly crimes committed by virtual currency exchanges, mixing and tumbling services, and

¹ See N. Heller and S. Enzer, “Crypto Insider Trading: What Exchanges Should Know,” *New York Law Journal* (Dec. 3, 2021).

² *United States v. Nathaniel Chastain*, Indictment No. 22 Cr. 302 (S.D.N.Y.).

money laundering infrastructure actors.”³ Firms that invest in digital assets or serve as a platform for the trading of such assets may want to reassess – and likely expand – their insider trading policies to ensure that robust and comprehensive compliance programs are in place to lessen any risk of this type of so-called “insider trading” of digital assets.⁴

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Bradley J. Bondi (partner) at 202.862.8910 or bbondi@cahill.com; Vitaliy Kats (associate) at 202.862.8932 or vkats@cahill.com; or Kevin Snell (associate) at 202.862.8946 or ksnell@cahill.com; or e-mail publications@cahill.com.

³ Press Release, Lisa O. Monaco, Deputy Attorney General, Office of Public Affairs, Deputy Attorney General Lisa O. Monaco Announces National Cryptocurrency Enforcement Team (October 6, 2021), <https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-national-cryptocurrency-enforcement-team>.

⁴ See Bradley J. Bondi & Steven D. Lofchie, *The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practices for Ensuring Compliance*, 8 N.Y.U. J. L. & Bus. 151, 153 (2012).

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